SMITHSONIAN INSTITUTION

REPORT OF THE LAW COMMITTEE OF THE
BOARD OF REGENTS APPOINTED TO
CONSIDER MATERIAL PAPERS
RELATING TO THE FREER
GIFT AND BEQUEST

(PUBLICATION 3022)

CITY OF WASHINGTON
PUBLISHED BY THE SMITHSONIAN INSTITUTION
JUNE 5, 1929

Freer Gallery of Art
Washington, D. C.

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PREFACE

On May 11, 1927, I submitted to the Board of Regents a memorandum presenting eleven specific points in connection with the administration of the Freer Gallery of Art and the Freer Bequest on which differences of interpretation of Mr. Freer's intention had arisen. In February, 1928, there was printed at the request of the Permanent Committee, for the use of the Board, a pamphlet presenting material papers relating to the Freer Gift and Bequest. After consideration of these papers, the Board passed the following resolution at its meeting of February 17, 1928:

Resolved, That a special law committee of the Board, comprising Messrs. Hughes, Robinson, and Moore, be requested to consider the queries propounded by the memorandum of the Acting Secretary, dated May 11, 1927, in connection with the "Material Papers Relating to the Freer Gift and Bequest," and to report thereon to the Board.

The report of the law committee is printed in the present pamphlet for the convenience of the Board.

C. G. ABBOT, *Secretary*.

May 24, 1929.

REPORT OF THE LAW COMMITTEE OF THE BOARD
OF REGENTS APPOINTED TO CONSIDER MA-
TERIAL PAPERS RELATING TO THE
FREER GIFT AND BEQUEST

To the
BOARD OF REGENTS OF THE SMITHSONIAN INSTITUTION.

Dear Sirs :

The undersigned, appointed as a Special Law Committee of the Board of Regents " to consider the queries propounded by the Memorandum of the Acting Secretary, dated May 11, 1927, in connection with the ' Material Papers Relating to the Freer Gift and Bequest,' " beg leave to submit the following report :

It is not deemed to be necessary to review at length the events which preceded the making of the Freer Gift and Bequest or to discuss the general principles of law which are applicable. It is assumed that the members of the Board of Regents are familiar with the general history of the matter as set forth in the pamphlet published by the Smithsonian Institution, entitled, " Material Papers Relating to the Freer Gift and Bequest." This report will be confined to the points raised in the Memorandum of the Acting Secretary to which the resolution appointing this Committee refers.

The Memorandum presents eleven questions which will be considered *seriatim* :

1. Does Paragraph 4 of the Deed of Gift of May 5, 1906, require the Smithsonian, without use of any Freer funds whatever, to provide upkeep, repair, watch, heat, light, cleaning of building, repair and cleaning of collections, recording, labeling and moving of specimens? If so does the said care of specimens extend to new additions thereto?

The Deed of Gift, of May 5, 1906, conveyed to the Smithsonian Institution " the art objects belonging to said party of the first part " (Mr. Freer) " and now in his possession at No. 33 Perry Avenue east, in the City of Detroit, Michigan, particularly enumerated in the printed inventory hereto attached and made a part hereof." The conveyance was upon specified conditions. Mr. Freer was to bequeath to the Institution the sum of Five Hundred Thousand Dollars (\$500,000) to be used exclusively in the construction and equipment of a fireproof building connected with the National Museum or reason-

ably near thereto, upon a site to be furnished by the Institution, according to plans and specifications to be agreed upon between Mr. Freer and the Regents. The building thus provided was to be used exclusively "for storing and exhibiting the objects covered by this instrument and such objects as may hereafter be transferred" by Mr. Freer to the Institution. It was provided that Mr. Freer might "add other appropriate objects to be selected by him to those enumerated in said inventory," and such other objects when transferred to the Institution were to be subject in all respects to the terms and conditions of the instrument. The objects embraced in the inventory with such additions as should be made by Mr. Freer during his lifetime and transferred to the Institution were to be delivered by Mr. Freer's executors to the Institution immediately after the building was ready to receive them.

Paragraph 4 to which the question relates then provided as follows :

4. The said building, when constructed, and the objects, when delivered, shall be cared for and maintained perpetually by said second party, or its successors, at its own expense.

Mr. Freer's will dated May 13, 1918, stated in Paragraph Eighteenth that he had theretofore "given by Deed of Gift and by bills of sale" to the Institution, "a collection of objects of art" and he had further given the Institution One Million Dollars to be used in the erection of a building to house the said collection, which building was then in process of construction. In Paragraph Twenty-first of the will, the testator bequeathed to the Institution "all art objects listed in an inventory entitled 'An Appendix to an Inventory of the Collection of Charles L. Freer presented to the Smithsonian Institution' and not transferred to said Institution by bill of sale prior to my death."

In Paragraph 4 of the codicil, dated May 4, 1919, the testator in disposing of the residue of his estate provided :

If any exigency shall arise making such use necessary, the income from such residue of my estate shall be used for the care, protection and maintenance of the building in my said will provided for, and of the collections in my said will mentioned.

This provision apparently contemplated an exigency that might arise through the inability of the Institution, because of failure of appropriations or otherwise, to provide the care and maintenance which it had assumed, but is not to be regarded as relieving the Institution of that obligation.

The residuary clause also authorized the Institution to make purchases of very fine examples of Oriental, Egyptian and Near Eastern fine arts, on the conditions stated, and it was provided that "such

purchases shall become part of the Freer collection." The Institution was also empowered by the codicil "notwithstanding anything to the contrary contained in any document" theretofore executed by the testator, to accept for the Freer Collection such gifts as might be tendered for that collection by certain persons named, each of whom had already contributed important art objects "to that part of the National Collection at present in my care."

The provisions of the Deed of Gift followed the offer made by Mr. Freer to the President of the United States on December 15, 1905, and a resolution of acceptance adopted by the Board of Regents on January 24, 1906. In view of the acceptance of the Deed of Gift and of the Bequest in Mr. Freer's will, your Committee is of the opinion that the provisions of Paragraph 4 of the Deed of Gift of May 5, 1906, require the Institution, without use of any Freer funds whatever, to provide upkeep, repair, watch, heat, light, cleaning of building, repair and cleaning of collections, recording, labelling and moving of specimens, except so far as this requirement may be deemed to be modified by the provisions of Paragraphs Eighteenth, Nineteenth and Twentieth of Mr. Freer's will to which reference is made below.

The only question, in this connection, that could arise would be with respect to additional objects added to the collection as provided under the terms of the codicil, which were not included in the objects embraced in the deed of gift, but it is deemed to be the fair construction of the bequest that the objects subsequently acquired under its terms which were to constitute a part of the Freer Collection should be maintained in the same manner as those for which the deed of gift specifically provides.

2. Does the language of paragraphs 18, 19 and 20 of the Freer will require the incomes specified as solely applicable to certain objects to be regarded: 1. As the income of the specified capital sums named; 2. As the income of the particular shares of stock named; 3. As fixed incomes of the magnitude assignable under usual trust fund conditions to the capital sums named? If interpretation (3) is defensible, should not profit and loss on stocks mentioned in paragraphs 18, 19 and 20 go to the general Freer bequest? In view of the fluctuation of stocks and incomes it would obviously be advantageous if the third construction could be adopted.

Paragraphs 18, 19 and 20 of the Freer will are as follows:

Eighteenth: I have heretofore given, by deed of gift and by bills of sale, to the Smithsonian Institution, an establishment created by Act of Congress, a

collection of objects of art, and I have further given said Smithsonian Institution One Million Dollars (\$1,000,000) to be used in the erection of a building to house the said collection, which building is now in process of construction, and have further given said Smithsonian Institution Two Thousand (2,000) shares of the capital stock of Parke, Davis and Company, a Michigan corporation, to be used, if necessary, for the completion of said building and the complete furnishing and equipment thereof. In addition to the gifts last above mentioned, I give and bequeath to said Smithsonian Institution capital stock of said Parke, Davis and Company of the market value at the time of my death of Two Hundred Thousand Dollars (\$200,000). The cash dividends on said stock, or the income derived from the proceeds of the sale thereof, shall be used by the Regents of said Institution solely for the purpose of hiring a competent curator, whose first service shall be the faithful oversight, intelligent exhibition, and careful protection of the collections transferred by me by deed of gift or bills of sale or bequeathed by this Will to said Institution.

Nineteenth: I give and bequeath to said Smithsonian Institution the sum of Two Hundred Thousand Dollars (\$200,000) of the capital stock of said Parke, Davis and Company, at the market value thereof at the time of my death, the cash dividends on said stock, or income derived from the proceeds thereof, to be used by the Regents of said Institution for the creation of ornamental gardens within the court and corridors of said building and on the grounds immediately surrounding it, and for the purchase of suitable American statuary, including permanent wall panels, for erection at appropriate places in said court and corridors and I request the Regents of said Institution to consult fully with Mr. Charles A. Platt, the architect of the building now under erection, concerning the choice of materials to be used and the sculptors to be employed. The architectural features involved in this bequest I ask the said Regents to entrust to the aforesaid Charles A. Platt.

Twentieth: I give and bequeath to said Smithsonian Institution capital stock of said Parke, Davis and Company of the market value at the time of my death of Fifty Thousand Dollars (\$50,000). The cash dividends on said stock, or the income derived from the proceeds of the sale thereof, shall be used solely for the care and maintenance of the gardens and statuary provided for in the next preceding paragraph of this Will.

These bequests created three trust funds. The income to be applied is the income derived from these funds. It is not the income of the "specified capital sums named" as distinguished from the corpus of the trusts, nor is it a fixed income of the magnitude assignable under usual trust fund conditions to the capital sums named. The income as stated in the will consists of the cash dividends on the said shares of stock bequeathed in trust or the income derived from the proceeds of the sale thereof.

The first and third subdivisions of the question submitted are answered in the negative and the second subdivision is answered in the affirmative with the addition that the income to be applied embraces that derived from the proceeds of the sale of the shares mentioned.

3. Is it necessary to pay as annual compensation to the curator of the Freer Gallery the whole income of the capital fund described in Paragraph 18 of the will in the event that the interpretation (2) should be attached to query No. 2?

The trust in Paragraph Eighteenth is that the income "shall be used by the Regents of said Institution solely for the purpose of hiring a competent curator." It was manifestly the intention of the testator that this income should not be devoted to any other purpose if it was needed for the purpose stated. It is understood that the difficulty arises from the increase in the dividends on the shares of stock, which has been such that the amount is too large for the purpose stated if it is judged by the standard which may be deemed to be appropriate in determining the reasonable compensation of a competent curator of the ability required and with the duties assigned to him by the will.

Your Committee is of the opinion that the income derived from the cash dividends on the shares described in Paragraph Eighteenth of the will, or from the proceeds of the sale of said shares, must be used exclusively for the purpose of hiring a competent curator to the extent that it is necessary to provide an adequate compensation for the services of such a curator as the will contemplates. If the amount were greater than that required for such adequate compensation of "a competent curator," using the term in the sense stated below in answer to Question 6, it is the opinion of your Committee that it should not be regarded as the intention of the testator that the excess should be paid to the curator, as the purpose of the trust was to provide adequate compensation and not to give a bequest independent of the requirements of such compensation. Any residue unexpended for that purpose would, in the opinion of your Committee, fall into the residuary estate to be used under Paragraph 4 of the codicil.

4. Is it necessary to devote the whole income of the capital fund described in paragraph 19 of the will to the purposes described in lines 6 to 10 of said paragraph even though (a) the interpretation (2) of query should prevail and the capital fund should greatly increase, and, (b) though the curator and Mr. Platt should both regard said disposition of said income to be wholly undesirable?

The income of the trust fund created by Paragraph Nineteenth is to be used "for the creation of ornamental gardens within the court and corridors of said building and on the grounds immediately surrounding it and for the purchase of suitable American statuary, in-

cluding permanent wall panels, for erection at appropriate places in said court and corridors." It was the intention of the testator that the income should be devoted to this purpose so far as necessary, but it is not believed to have been the intention of the testator, that the income should be squandered in providing for gardens, statuary or wall panels which were either unnecessary or inappropriate. If the income of the trust fund is found to be greater than the amount required for the purpose stated, the surplus would, in the opinion of your Committee, fall into the residuary estate to be applied under Paragraph 4 of the codicil. The Regents may appropriately avail themselves of the opinion of Mr. Platt as contemplated by Paragraph Nineteenth.

5. Is it proper to devote the income mentioned in paragraph 20 of the will to the payment of the Superintendent of the Freer building as is now the practice?

Paragraph Twentieth provides that the income of the trust fund thereby created "shall be used solely for the care and maintenance of the gardens and statuary provided for in the next preceding paragraph of this Will." It is the opinion of your Committee that this income should be used solely for the purpose mentioned so far as it is necessary for that purpose, and may be used to pay the Superintendent of the Freer building if he performs the service contemplated by Paragraph Twentieth, but should not be paid to him as compensation for other services.

While the testator intended to provide adequately for the care and maintenance of the gardens and statuary, it is not believed that he intended that an amount not so required should nevertheless be expended for that purpose, and any surplus which may remain of the income on the shares held in trust under this paragraph, after adequately providing for the care and maintenance of the gardens and statuary referred to, would fall into the residuary estate to be held and expended under Paragraph 4 of the codicil.

6. In paragraph 18, is it defensible to regard the expression "a competent curator" as a personage of plurality, so that more than one curatorial person could be employed with the income mentioned in said paragraph? It is conceivable that no single person would be found to unite all the qualities of "a competent curator."

The testator provided in Paragraph Eighteenth for "hiring a competent curator, whose first service shall be the faithful oversight, in-

telligent exhibition and careful protection of the collections transferred by me by deed of gift or bills of sale or bequeathed by this Will to said Institution." The testator contemplated "a competent curator" who should have the supervision of the collections, as stated. It would not be in accordance with this intent if the income of the trust fund were only large enough to provide for a single curator of the required ability, and with the duties assigned to him, to divide it among two or more. Nor would it be permissible, if these duties could be performed as contemplated by a single person, to employ more. If, however, it should be found to be impracticable for a single curator to discharge appropriately all the duties prescribed, and the income exceeded the amount of his adequate compensation, it is the opinion of your Committee that surplus income of the fund could be used to secure such associate or assistants as might be needed, provided the work of such associate or assistants were curatorial in character and would not come under the head of the subordinate or clerical work, the expense of which, aside from curatorial service, the Institution had assumed.

7. In paragraph 4 of the First Codicil, lines 8 to 10, is the word civilization to be regarded as embracing all degrees of "being reclaimed from the rudeness of savage life, and advanced in arts and learning"? Is the income described applicable to the study of all attributes of the civilized state, so far as the Regents of the Smithsonian may direct, and so far as associated with the civilization of the Far East? What geographic limits are to be set to the term "Far East"? Should it include all territory between the 90th and 180th meridians of East longitude, and between latitude $+90^{\circ}$ and -90° , or should it be regarded as restricted to the limits of China and Japan, or nearly so? May phenomena now existing in other localities, but traceable to the civilization of the Far East, be studied with said income?

Paragraph 4 of the First Codicil, so far as involved in this question, provides as follows.

I give, devise and bequeath to the Smithsonian Institution, named in said will, the remainder of my estate real and personal, wherever situated. If any exigency shall arise making such use necessary, the income from such residue of my estate shall be used for the care, protection and maintenance of the building in my said will provided for, and of the collections in my said will mentioned. If no such exigency shall arise, so much of the income from such residue shall be used for the encouragement of the study of the civilization of the Far East, as the Regents of the Smithsonian Institution shall determine;

Your Committee is of the opinion that the word "civilization" as used by the testator in Paragraph 4 of the First Codicil is not to be regarded as embracing all degrees of "being reclaimed from the rudeness of savage life, and advanced in arts and learning." Your Committee believes that the provisions of the will and the attending circumstances which may properly be taken into consideration indicate quite clearly that the testator in using the term "civilization" intended to refer to a degree of culture beyond the primitive. As the testator was interested in objects of art, it seems to your Committee that his purpose was to encourage the study of the civilization of the Far East in relation to the development of the fine arts, and not in the wider sense as relating to all efforts at progress that may have been made in emerging from a savage condition.

Your Committee is further of the opinion that the income described is not applicable to the study "of all attributes of the civilized state, so far as the Regents of the Smithsonian Institution may direct, and so far as associated with the civilization of the Far East," for this would involve the possible study of everything which has a human interest in relation to civilization, as for example, all matters pertaining to social, political and governmental relations and development. It is the opinion of your Committee that the testator had in mind the study of civilization which would throw light upon the development of the fine arts.

The term "Far East" as used by the testator is to be regarded as having reference to what is generally considered to be the Far East and not to include "all territory between the 90th and 180th meridians of East longitude and between latitude $+90^{\circ}$ and -90° ," but should be regarded as restricted to China, Japan, Korea and Indo-China and territory closely related thereto.

Your Committee does not believe that "phenomena now existing in other localities, but traceable to the civilization of the 'Far East,'" may be studied with the income derived from the bequest as this would be taken to justify archeological researches in various parts of the American continent such as Alaska, Mexico, Peru, etc., whereas the testator, as the Committee thinks, had in mind the study of the civilization of the Far East itself and not of that which was traceable remotely to the Far East.

8. In paragraph 4 of the said Codicil, lines 10 to 37, does the language of line 12 (and following) beginning "and to that end" indicate the *sole* methods to be employed "for the promotion of high ideals of beauty," or merely suggest certain

methods, or even certain preferred methods but not to the exclusion of other methods deemed by the Regents of the Smithsonian as conducive to that end? May purchases described in lines 12 to 15 be made after the time when by decease or otherwise the approval of any survivors of the four "friends" named shall be no longer available?

The provision is:

and the remainder of the income from said residue shall be used for the promotion of high ideals of beauty and, to that end, as opportunities shall from time to time occur to make the same, occasional purchases shall be made of very fine examples of Oriental, Egyptian and Near Eastern fine arts, after original objects of art produced in the Far East, Egypt or the Near East shall have been examined and approved by one or all of my following named friends, namely, Miss Katharine N. Rhoades, Mr. and Mrs. Eugene Meyer, Jr., and Mrs. H. O. Havemeyer, in consultation with the Fine Arts National Commission, which I require shall be consulted as to all purchases for the collection. Such purchases shall become part of the Freer collection. If, from lack of opportunity, the last described purchases cannot be made, and opportunities from time to time arise for the purchase by the Smithsonian Institution of works of painting, sculpture and pottery of high aesthetic quality, the work of American painters, sculptors and potters, then such purchases shall be made and the works purchased shall immediately become the property of the United States National Gallery of Art, in perpetuity and for exhibition in its own galleries or for loan exhibition in such other galleries everywhere throughout the world as may seem safe and wise to the Regents of the Smithsonian Institution (U. S. National Gallery of Art), excepting that no such paintings, works of sculpture or pottery so purchased with any part of said income shall be exhibited permanently in the building mentioned in the 18th paragraph of said will. Such residue of income shall, however, be allowed to accumulate until opportunity arises to purchase objects of art of the very highest quality needed in the collection.

It will be observed that the language throughout this provision is mandatory. The remainder of the income from said residue "*shall* be used" for the promotion of high ideals of beauty. It is "to that end" that as opportunities occur "occasional purchase *shall* be made of very fine examples," etc. Such purchases "*shall* become" part of the Freer collection. If from lack of opportunity such purchases cannot be made and there are other opportunities described to purchase the work of American painters, sculptors and potters "then such purchases *shall* be made" and the works purchased "*shall* immediately become" the property of the United States National Gallery of Art. The residue of income in question "*shall* be allowed to accumulate until opportunity arises to purchase objects of art of the very highest quality needed in the collection."

Your Committee is of the opinion that what the testator intended by "the promotion of high ideals of beauty" is shown by the context. These ideals are to be promoted first by purchases of very fine examples of Oriental, Egyptian and Near Eastern art which must be made if they can be made. If not, then works of high aesthetic quality of American painters, sculptors and potters are to be made if they can be made. But the residue of income in question is to be allowed to accumulate as stated. Your Committee is of the opinion that under this language the Regents cannot consider other methods of promoting "high ideals of beauty" which in their opinion might be appropriate were it not for the limitation imposed by the testator.

The reference to the approval of "one or all" of the four friends named in this provision your Committee thinks necessarily means while these friends are living. It does not require that the purchases shall not be made in case of their death. The approval should be had of any of the survivors of the four friends.

9. In view of the very positive language of paragraph 5 of the deed of gift of May 5, 1906, and the expressions of paragraph 27 of the will, lines 19 to 22, and paragraph 4 of the Codicil, lines 11 to 21, is it not to be regarded that the testator contemplated that few (and those only of the choicest) additions would ever be made to the Freer Gallery collections, so that in the event of the making of large collections by excavation or purchase, the vast majority of whatever specimens might be purchased under the operation of paragraph 4 of the Codicil must be deposited either with the National Museum, the National Gallery of Art, or other depositories selected by the Regents of the Smithsonian?

Your Committee does not think it would serve any useful purpose to attempt to answer this question categorically. The provisions of Paragraph 4 of the Codicil, as above stated, indicate quite clearly what sort of purchases were to be made for the Freer collection. The limit is not fixed as to number but with respect to origin, quality and amount of income available. The character and disposition of other purchases authorized by the provisions of Paragraph 4 of the Codicil are also prescribed. Such other works so purchased "immediately become the property of the United States National Gallery of Art, in perpetuity and for exhibition in its own galleries or for loan exhibition in such other galleries everywhere throughout the world as may seem safe and wise to the Regents," but no such works are to be "exhibited permanently" in the building described in Paragraph Eighteenth of

the will, that is the building there described as being provided for the Freer collections.

10. Is it not to be assumed that in conformity with general principles of administration the Regents of the Smithsonian Institution through their Secretary retain the powers of initiative and veto over the actions of the Curator of the Freer Gallery subject only to legal restraints operating from the terms of the deed of gift and the will? Is it not also to be assumed, from the same sanction, that the Regents may divert to the care of the Freer trust funds and expend in such manner as they direct, a usual percentage not exceeding 5 per cent of the income of said fund?

It was the intention of the testator that a competent curator should be employed and that he should perform the duties of faithful oversight, intelligent exhibition and careful protection of the collections in question. Such a curator naturally should have the broad range of discretion in performing his duties which the expert qualifications justifying his appointment as curator would make appropriate. But the final supervision and control reposed in the Regents of the Smithsonian Institution with respect to all its affairs cannot be regarded as in any way impaired and their general authority is subject only to such restraints as operate from the conditions of the acceptance of the deed of gift and the bequest.

The Regents may charge to the income of the Freer funds not "a usual percentage not exceeding 5 per cent," but the actual expense incurred by them in the course of proper administration, excepting such expense as has been assumed by the Institution under the provisions of the gift, as already stated.

11. Should the paintings of American artists be exhibited in the galleries designated for them on the plans drawn by the architect under Mr. Freer's directions, as ordered by the late Secretary Walcott?

Your Committee is of the opinion that this is a matter to be determined in the ordinary course of administration and is not one appropriate for its consideration as a special law committee.

The Secretary has advised your Committee that he has considered the best employment of the large revenue from the Freer bequest. He states that the annual operations leave large unexpended yearly balance and that by the wise investment of principal and unexpended

income, as directed by the Permanent Committee, the Freer income is increasing rapidly. It appears that the construction of a new building has been the subject of consideration. It is the opinion of your Committee that the amount derived from the residuary bequest, the application of which is directed by the testator with the proviso that it shall accumulate if it cannot be so applied, may not be devoted to the construction of an additional building.

It also appears that certain recommendations have been made for a gradual but considerable increase in the scope of studies of the civilization of the Far East. It is suggested by the Secretary that it would not be desirable, if the income from the Freer bequest cannot be expended in building a new Freer gallery, to save income as at present, but that it would be best to adopt a plan of operation aimed to expend the entire Freer income. Suggestions to this end have been made. Your Committee, however, does not feel that it should undertake the consideration of these proposed plans but believes that they should go before the Permanent Committee which can advise the Regents as to the action they should take within the limits of their authority under the terms of the Freer deed of gift and bequest.

Respectfully submitted,

(Signed) CHARLES E. HUGHES,
JOE. T. ROBINSON,
R. WALTON MOORE.

WASHINGTON, D. C.,
May 7, 1929.

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